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IN THE

Supreme Court of the United States

OCTOBER TERM—1950

No. 288

ERNESTINA G. FLEISCHMAN,
Petitioner,

v.

UNITED STATES OF AMERICA.

HELEN R. BRYAN,
Petitioner,

v.

UNITED STATES OF AMERICA.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

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JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners herein pray that writs of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit affirming the judgments of convictions of petitioners by the United States District Court for the District of Columbia.

Statement of the Matter Involved

The facts and proceedings involved in these prosecutions were before this Court in *United States* v. *Bryan,* 339 U. S. 323, and *United States* v. *Fleischman,* 339 U. S. 349.

The Court stated the matter involved in *Bryan* as follows:

> "Respondent (Bryan) is the executive secretary of an organization known as the Joint Anti-Fascist Refugee Committee (hereinafter referred to as the association) and as such has custody of its records. Prior to April 4, 1946, the Committee on Un-American Activities of the House of Representatives, which was conducting an investigation into the activities of the association, had attempted without success to procure these records from respondent and from the chairman of the association's executive board, Dr. Edward K. Barsky. On March 29, 1946, the Committee issued subpoenas to each of the known members of the executive board summoning them to appear in the Committee's room on April 4, 1946, at 10 a.m., to testify and produce certain specified records of the association, and an identical subpoena directed to the association by name was served upon respondent Bryan in her official capacity.
>
> "Bryan and the members of the executive board appeared before the Committee at the date and time set out in the subpoenas and in response thereto. Each person so summoned failed to produce any of the records specified in the subpoenas. The members of the executive board made identical statements in which each declared that he or she did not have possession, custody or control of the records; that Miss Bryan, the executive secretary, did. Respondent admitted that the records were in her possession but refused to comply with the subpoena because 'after consulting with counsel (she) came to the conclusion that the subpoena was not valid' because the Committee had no constitutional right to demand the

books and records. Asked whether the executive board supported her action, she refused to answer because she did not think the question pertinent.

"The Committee on Un-American Activities then submitted its report and resolution to the House. Setting out at length the Committee's attempts to procure the records of the association, the report concludes: 'The willful and deliberate refusal of Helen R. Bryan and the members of the executive board of the Joint Anti-Fascist Refugee Committee as named herein to produce the books, papers, and records called for in the subpoenas deprives your committee of evidence necessary in the conduct of its investigation of the Joint Anti-Fascist Refugee Committee, which evidence is pertinent to said investigation and places the said persons in contempt of the House of Representatives of the United States'.

"Respondent was indicted for violation of R. S. § 102 (2 U. S. C. § 192), in that she had failed to produce the records called for in the subpoenas and had thereby wilfully made default. At the trial she contended, *inter alia*, that she was not guilty of wilful default because a quorum of the Committee on Un-American Activities had not been present when she appeared on the return day. However, the trial court withdrew that issue from the jury's consideration by instructing the jury 'as a matter of law, that the Committee on Un-American Activities of the House of Representatives was a validly constituted committee of the Congress, and was at the time of the defendant's appearance.' Respondent was found guilty, (72 F. Supp. 58), but the Court of Appeals for the District of Columbia, one judge dissenting, reversed the judgment on the ground that the presence of a quorum of the Committee at the hearing on April 4, 1946, was a material question of fact in the alleged offense and should have been submitted to the jury (84 App. D. C. 394, 174 F. 2d 525). We granted a writ of certiorari, 338 U. S. 846, to consider this important question affecting the procedures of congressional committees." 339 U. S., at pages 324-327.

The essentials of the *Fleischman* case were set out by the Court in this fashion:

> "Respondent Fleischman is a member of the executive board of an organization known as the Joint Anti-Fascist Refugee Committee (hereinafter referred to as the association), which, during 1945 and 1946, was under investigation by the House Committee on Un-American Activities. In furtherance of its investigation, the Committee issued subpeonas on March 29, 1946, to each of the members of the executive board and to Helen R. Bryan, the executive secretary of the association, demanding that they produce certain of the association's records in the Committee Chamber on April 4, 1946. Fleischman and the other members of the board appeared on that date in response to the subpoenas but did not produce the records. The Committee thereupon reported to the House that the members of the executive board were in contempt of that body. After debate, the House voted to direct the Speaker to certify the Committee's report to the United States District Attorney for legal action.
>
> "Respondent and the other members of the executive board were jointly indicted for wilful default under R. S. § 102 (2 U. S. C. § 192), but Fleischman was tried separately from the others. Her defense, like that of Bryan, consisted in part in the contention that she could not be guilty of wilful default because a quorum of the Committee had not been present when she appeared in response to the subpoena. The trial court withdrew that issue from the jury, holding 'as a matter of law, that the Committee on Un-American Activities of the House of Representatives was a validly constituted committee of Congress, and was at the time of the defendant's appearance.' The Court of Appeals for the District of Columbia reversed, one judge dissenting, 84 U. S. App. D. C. 388, 174 F. 2d 519, on the ground that presence of a quorum of the Committee at the time of respondent's appearance was a material question of fact for the jury. The Court also divided on the question of whether there was sufficient evidence to

support the conviction, a majority holding the evidence sufficient. We granted a writ of certiorari, 338 U. S. 846, to consider these important questions arising under R. S. § 102." 339 U. S., at pages 350-352.

In the opinion for the Court in *Bryan,* written by VINSON, *C. J.,* it was held that upon the record herein the presence of a quorum of the House Committee at the hearing of April 4, 1946 was not a material issue of fact and that it was therefore not error for the trial court to take that issue from the jury; and it was further held that the trial court committed no error in admitting into evidence the testimony of Byran before the Committee although Section 3486, of Title 18 U. S. C., provides that "No testimony given by a witness before . . . any committee of either House, . . . shall be used as evidence in any criminal proceeding against him in any court . . .". The judgment of the Court of Appeals, wherein a new trial was ordered, was therefore reversed. JACKSON, *J.,* wrote a separate concurring opinion agreeing with the foregoing result. BLACK, *J.,* with FRANKFURTER, *J.,* concurring, dissented from the Court's constructions of 18 U. S. C. § 3486 and voted to affirm the judgment remanding the cause for a new trial. DOUGLAS and CLARK, *JJ.,* took no part in the consideration or decision of the case.

In *Fleischman* the Court also reversed the judgment of the Court of Appeals in the cause. The majority opinion by VINSON, *C. J.,* followed the decision of the Court in *Bryan* with respect to the "quorum question" and the admissibility of testimony before a congressional committee under 18 U. S. C. § 3486 in a prosecution for contempt pursuant to 2 U. S. C. § 192. In addition, it was held that the evidence was sufficient to support the verdict of guilty in this case. From this latter proposition BLACK and FRANKFURTER, *JJ.,* dissented. DOUGLAS and CLARK, *JJ.,* did not participate in the case.

In both *Bryan* and *Fleischman* the opinion of the Court concludes as follows:

> "Respondent advances several contentions which were not passed upon by the Court of Appeals. We do not decide them at the time. The judgment of the Court of Appeals is reversed." (339 U. S., at pages 343, 365).

Within a timely period after the foregoing decision of the Court, petitioners applied for rehearing and those petitions were denied on June 5, 1950 (70 S. Ct. 1017, 1018).

Petitioners thereupon moved in the Court of Appeals for leave to brief and argue the questions remanded to that court. The motion was denied on July 7, 1950 and on July 10, 1950, the Court of Appeals affirmed the judgments of conviction with the following *per curiam* opinion:

> "In reversing our judgments and remanding these cases to us for further proceedings, the Supreme Court did not pass upon contentions of the appellants that had not been passed upon by this court. *United States* v. *Bryan,* 339 U. S. 323, 343; *United States* v. *Fleischman,* 339 U. S. 349, 365. But substantially the same contentions have been overruled by the Supreme Court or by this court in other cases. *Dennis* v. *United States,* 339 U. S. 162; *Barsky* v. *United States,* 83 U. S. App. D. C. 127, 167 F. 2d 241, *cert. denied,* 334 U. S. 843, *rehearing denied,* U. S. , 18 U. S. L. W. 3328; *Kamp* v. *United States,* 84 U. S. App. D. C. 187, 176 F. 2d 618, *cert. denied,* U. S. , 18 U. S. L. W. 3315" (R. 396).

Opinions Below

The opinion of the Court of Appeals for the District of Columbia Circuit upon the remand of these causes by this Court has not yet been officially reported.

Jurisdiction

The judgments of the Court of Appeals affirming the judgments of convictions of petitioners by the District Court is dated July 10, 1950.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code. See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

Statutes and Resolutions Involved

1. 2 U. S. C. § 192; R. S. § 103, as amended June 22, 1938, c. 594, 52 Stat. 942.

> *Refusal of witness to testify.* Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refused to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

2. H. Res. 5, 79th Cong., 1st Sess., 91 Cong. Rec. 10, 15 (January 3, 1945).

> Resolved, That the rules of the Seventy-eighth Congress be, and they are hereby, adopted as the rules of the Seventy-ninth Congress. That rule X of the Rules of the House of Representatives is amended by adding after clause 40a of the first paragraph a a new clause to read as follows:

'40b. On Un-American Activities, to consist of nine members.'

Rule XI of the Rules of the House of Representatives is amended by adding after clause 40a two new clauses to read as follows:

'40b. To Un-American Activities—to the Committee on Un-American Activities

'40c. The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

'The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

'For the purpose of any such investigation the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the Committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.'

Questions Presented

1. Whether the Resolution* as construed and applied herein abridged the freedom of speech, press and association of petitioners in violation of the First Amendment to the Constitution of the United States.

2. Whether the Resolution, on its face, authorized the House Committee** to abridge the freedom of speech, press and association of petitioners thereby violating the First Amendment to the Constitution of the United States.

3. Whether the Resolution, on its face and as construed and applied by the House Committee, acts as a prior restraint upon speech, press and association in violation of the First Amendment to the Constitution of the United States.

4. Whether the Resolution on its face and as construed and applied by the House Committee, invests the House Committee with powers not delegated to the Congress by the Constitution of the United States in violation of the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States.

5. Whether the Resolution failed to provide petitioners with an ascertainable standard of guilt whereby petitioners could determine, in advance, whether they were committing contempt by the non-production of the books and records summoned, in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

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* H. Res. 5, 79th Cong. 1st Sess. (1945) allegedly pursuant to which petitioners were investigated, is sometimes hereinafter referred to as "the Resolution".

** The House Committee on Un-American Activities is sometimes hereinafter referred to as the "House Committee".

6. Whether the petitioners made a wilful default in production of books and records within the meaning of Title 2, Section 192 of the United States Code.

7. Whether the trial courts erred in finding and charging the juries that the records summoned were pertinent to the matter under inquiry and erred in excluding certain evidence submitted by petitioners as to the lack of pertinency of those records.

8. Whether the trial court in *Fleischman* erred in submitting the issue of aiding and abetting to the jury and in the charge given with respect to that issue.

9. Whether the trial courts committed reversible errors in refusing petitioners' requests to discharge all government employees from the juries in these causes.

10. Whether the printed and written documents served upon petitioners were subpoenas *duces tecum* directed to them.

Specification of Errors

1. The United States Court of Appeals for the District of Columbia Circuit erred in failing to reverse the convictions of petitioners upon the ground that the Resolution is unconstitutional.

2. The United States Court of Appeals for the District of Columbia Circuit erred in failing to reverse the convictions of petitioners upon the ground that the trial courts improperly excluded evidence offered by petitioners as to the pertinency of the books and records summoned.

3. The United States Court of Appeals for the District of Columbia Circuit erred in failing to reverse the convictions of petitioners upon the grounds that the indictments

failed to state offenses against the United States; that the proof failed to establish the commission of such offense; and that the trial courts improperly charged the juries.

4. The United States Court of Appeals for the District of Columbia Circuit erred in failing to reverse the convictions of petitioners upon the ground that the trial courts allowed government employees to serve as jurors upon the trials of these causes.

5. The United States Court of Appeals for the District of Columbia Circuit erred in failing to reverse the convictions of petitioners upon the ground that the printed and written documents served upon the petitioners were not subpoenas *duces tecum* directed to them.

Argument

When the instant causes were before this Court during the October 1949 Term, the Court not only passed upon those matters which were considered and decided by the Court of Appeals for the District of Columbia Circuit but, in addition, this Court also reached certain issues not considered by the Court of Appeals in *Bryan* or *Fleischman*. Thus, this Court ruled upon the admissibility of the testimony of the petitioners before the House Committee and, in addition, upon the rule of law defining the obligation of members of associations pursuant to a subpoena for the production of books or records of such associations, although neither of these issues was the subject of adjudication by the Court of Appeals. Yet this Court did not pass upon other questions not ruled on by the Court of Appeals, including the basic and related issues concerning the constitutionality of the Resolution pursuant to which the House Committee has investigated the Joint Anti-Fascist Refugee Committee and summoned the petitioners, as well as the question whether it was appropriate for government

employes to sit as jurors in the prosecution of petitioners, and the question of the validity of the alleged subpoenas *duces tecum*. With regard to this last question the court specifically stated in *United States* v. *Bryan*, 70 S. Ct. 724, at p. 729, " 'Default' is, of course, a failure to comply with the summons. In this case we may assume, without deciding, that the subpoena served on respondent required her to produce the records of the association before the Committee on Un-American Activities, sitting as a committee." The Court of Appeals for the District of Columbia Circuit properly concluded from the manner in which this Court phrased its opinions in *Bryan* and *Fleischman* that these two latter issues were remanded to it.

It is too late in the day to reargue at length, upon a petition for writ of certiorari, that the Court should—pass upon the constitutionality of the Resolution and declare its invalidity under the First, Fifth, Sixth, Ninth and Tenth Amendments, or that the presence of government employees on juries trying persons accused of a contempt of the House Committee is a violation of the Fifth and Sixth Amendments to the United States Constitution. Arguments on those issues have been made to this Court at great length in numerous briefs submitted by parties and *amici curiae*. For the purposes of the instant petitions, petitioners rely upon, and respectfully refer the Court to the arguments on these matters which appear in the brief submitted on behalf of petitioners upon the appeal to this Court in the October Term, 1949, and upon the petition for writ of certiorari and the brief in support thereof together with the petition for rehearing and supplemental briefs in the case of *Barsky, et al.* v. *United States* (October Term, 1947, No. 766).

It does remain, however, to consider why this Court saw fit to pass upon certain of the questions not decided upon by the Court of Appeals and to remand others. With respect to the constitutionality of the Resolution and related issues, it may be supposed that this Court could not

reverse the Court of Appeals and reinstate the judgments of convictions without passing upon those issues and that, at least up to the conclusion of the 1949 Term, this Court was determined not to pass upon those issues except by way of denial of certiorari. Petitioners conclude that for this reason the constitutional issues were remanded to the Court of Appeals which could be expected to follow its earlier decisions upholding the constitutionality of the Resolution and thereafter this Court would again be enabled to exercise its discretion as to whether to grant certiorari from such a determination.

With respect to the jury question, however, this Court has shown no similar disinclination to pass upon the merits of that question. *Dennis* v. *United States,* 339 U. S. 162; see also *Morford* v. *United States,* 339 U. S. 258.

The suggested reasons for remanding the questions of constitutionality of the resolution do not obtain as to the jury question. But it was probable, when the Court decided *Bryan* and *Fleischman,* that these causes would again be before the Court in the 1950 Term upon petitions for certiorari after the remand. Petitioners therefore construe the remand of the jury question—which was briefed and argued to the Court by petitioners—as an indication that the Court was inclined to reserve the jury question for reconsideration at the 1950 Term of the Court when these causes would again be before the Court. The even division of the Court on the jury question underscores the advisability of reconsideration of whether government employees should sit as jurors in prosecutions for contempt of the House Committee.* For, as a result of that even division,

* In *Dennis* v. *United States,* 339 U. S. 162, four members of the Court (VINSON, BURTON, MINTON and REED, *JJ.*) indicated that they would not imply bias to government employees as a class so as to disqualify such employees as jurors in prosecutions under R. S. 102; BLACK, FRANKFURTER, and JACKSON, *JJ.*, indicated that they held a contrary view. In *Morford* v. *United States,* 339 U. S. 258, 259, DOUGLAS, *J.*, indicated that he agreed with the dissenting Justices in *Dennis.* CLARK, *J.*, has not sat in the instant causes or any other causes initiated during his term as Attorney General. The Court is, therefore, at this time evenly divided in principle on the jury question here involved.

the decision of this Court where government employees are allowed to act as jurors in prosecutions for alleged contempt of the House Committee depends upon the circumstances whether a judgment of conviction has been sustained or reversed by the Court of Appeals from which the case comes to this Court. The state of the law should not be thus left in such uncertainty.

Petitioners, both in the District Court and Circuit Court urged that the papers served upon them were not subpoenas *duces tecum*, directed to them, but rather were orders issued to the "Sergeant-at-Arms, or His Special Messenger", directing such Sergeant-at-Arms, or His Special Messenger "to bring with *you*" (emphasis added) certain books and records. It laid no duty on respondents to produce these books and records. However, the question was not presented to or passed upon by this Court, which specifically stated it was not deciding this question.

This is a matter of vital importance, since the prosecution of respondents under R. S. § 102 was based on the assumption that respondents were persons "who having been summoned as . . . witness [es] by the authority of either House of Congress . . . to produce papers . . . ." If the paper in question was a direction to the Sergeant-at-Arms to produce and not to respondents, then their appearance before the Committee was voluntary and the request of the Committee at the hearing for the books was not a summons to produce within the meaning of the statute.

This Court did not pass upon the question of respondent Fleischman's liability as an "aider and abettor", although the charge to the jury, over respondent's objection, encompassed this theory of her guilt. Added importance is given to this question by the court's decision in relation to R. S. § 859, now codified in § 3486 of Title 18 of U. S. C. The court said, *United States* v. *Bryan*, 70 S. Ct. 724, p. 735:

> ". . . Congress intended the immunity therein provided to apply only to *past* criminal acts concerning which the witness should be called to testify. The offense of contempt of Congress, with which we are presently concerned, on the other hand, matures only when the witness is called to appear before the committee to answer questions or produce documents and wilfully fails to do so. Until that moment he has committed no crime."

If respondent Fleischman was convicted of the offense of aiding and abetting (and there is no way of telling on what theory the jury found her guilty), then it may have been an aiding and abetting which occurred prior to her appearance before the Committee, and even under the ruling in *United States* v. *Bryan, supra,* her testimony before the Committee was inadmissible at her trial. Respondent Fleischman presents as one of the questions on this petition whether the trial court erred in submitting the issue of aiding and abetting to the jury and in the charge given with respect to that issue. This question requires an answer from this Court.

It is therefore urged by petitioners that the writs prayed for be granted not only for the settlement of the constitutional and other related issues which this Court did not heretofore but should decide, but in addition because the unsettled status of the law on the question whether government employees may sit on juries in causes such as are here involved makes it necessary and appropriate that this Court reconsider its ruling in *Dennis,* and for the further reason that other important issues of law have not been considered by this Court.

CONCLUSION

Petitioners pray that writs of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review its judgments.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 288

ERNESTINA G. FLEISCHMAN AND HELEN R. BRYAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 396) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1950 (R. 397). On August 2, 1950, the time within which to file a petition for a writ of certiorari was extended by order of the

Chief Justice to and including September 8, 1950. The petition was filed on September 2, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether all government employees should be peremptorily excluded from jury service in cases involving contempt of the House of Representatives.

2. Whether subpoenas for certain documents imposed no duty to produce upon petitioners, because in terms directed not to them but to the Sergeant-at-Arms of the House of Representatives.

3. Whether the court erred in instructing the jury that petitioner Fleischman could be found guilty of wilfully making default by refusing to produce the subpoenaed documents if she aided and abetted others in refusing to produce them.

STATEMENT

Prior to April 4, 1946, the date of the defaults involved in these cases, the Committee on Un-American Activities of the House of Representatives had unsuccessfully attempted to procure certain records from the Joint Anti-Fascist Refugee Committee (hereinafter referred to as the Association) from the chairman of its executive board, Dr. Edward K. Barsky, and from its executive secretary, petitioner Helen R. Bryan (R. 35-38, 180-

182, 201, 317). On March 29, 1946, in a further effort to secure the records, the Committee issued subpoenas to each of the known members of the executive board, among them the petitioner Ernestina G. Fleischman, and summoned each of them to appear on April 4, 1946, to testify and produce the books, ledgers, records, and papers of the Association relating to the receipt and disbursement of moneys and correspondence with persons in foreign countries during the period from January 1, 1945, to and including March 29, 1946 (R. 170, 179, 182, 196-197, 201-202, 312). An identical subpoena directed to the Association by name was issued and served upon petitioner Bryan, who accepted service in her official capacity as executive secretary (R. 36-37). Petitioners Bryan and Fleischman, as well as others, appeared before the Committee on April 4, 1946, but each failed to produce before the Committee any of the records described in the subpoena (R. 35-46, 183, 196-198, 215). Instead, each board member appearing before the Committee read from identical typewritten documents stating that he or she individually did not have possession, custody or control of the books and records requested in the subpoena, and, therefore, was unable to comply with the subpoena, but that such material was in the custody and control of petitioner Bryan (R. 198, 218). In response to the question whether she personally would consent to the Committee's inspection of the books,

petitioner Fleischman indicated that she did not know and questioned the relevancy of such an inquiry (R. 203-204). Petitioner Bryan, on the other hand, admitted that she was custodian of the records but refused to comply with the subpoena because "after consulting with counsel [she] came to the conclusion that the subpoena was not valid" (R. 38, 46). In addition, she indicated that she "didn't know" whether she would produce the records if she were directed to do so by appropriate vote of the executive board (R. 44). The members of the executive board and petitioner Bryan were thereafter cited for contempt by the House of Representatives (92 Cong. Rec. 3761-3773).

On March 31, 1947, petitioner Fleischman and the other members of the executive board were charged in a two-count indictment filed in the United States District Court for the District of Columbia with conspiracy to commit contempt of Congress by wilfully failing to produce records before a congressional committee in accordance with the summons of that committee and thereby wilfully making default, in violation of R. S. §102, 2 U.S.C. 192 (count 1),[1] and also with committing the substantive offense defined in that section (count 2) (R. 74-78). Petitioner Bryan was charged in a separate indictment filed the same day with committing the same substantive offense (R.

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[1] At the outset of the trial of petitioner Fleischman, the first count of the indictment was dismissed (R. 83, 353).

1-2). Each petitioner was tried separately, Mrs. Fleischman having been out of the country when the other members of the executive board were tried,[2] and each was found guilty and sentenced to three months' imprisonment and to pay a fine of $500 (R. 18-19, 79-80).

In both cases the trial court ruled as a matter of law that there was a quorum present at the time of petitioners' appearances before the Committee (R. 62, 356). The Court of Appeals reversed both convictions on the ground that the question whether a quorum was present was a disputed question of fact which should have been submitted to the jury (R. 377-381). A majority of the Court of Appeals, however, held that the evidence was sufficient to sustain the conviction of petitioner Fleischman, who had challenged its sufficiency.

On writ of certiorari, granted at the instance of the Government, this Court reversed the judgments of the Court of Appeals (*United States* v. *Bryan*, 339 U. S. 323; *United States* v. *Fleischman*, 339 U. S. 349), holding that the presence of a quorum of the Committee at the time of the return of the subpoena was not an essential element of the offense, and that under the circumstances the defense of lack of a quorum was not available to petitioners (*Bryan*, 339 U. S. at 327-335; *Fleischman*, 339 U. S.

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[2] The remaining board members were tried together, found guilty on the second count, and their convictions were affirmed on appeal. *Barsky* v. *United States*, 167 F. 2d 241 (C.A.D.C.), certiorari denied, 334 U. S. 843, rehearing denied, 339 U. S. 971.

at 352). The Court also affirmed the majority ruling of the Court of Appeals sustaining the sufficiency of the evidence as against Fleischman (339 U. S. at 352-358). Several other questions, not passed upon by the Court of Appeals, were disposed of by this Court adversely to petitioners (*Bryan,* 339 U. S. at 335-343; *Fleischman,* 339 U. S. at 358-365), but other questions which the Court of Appeals had not passed upon were not decided by this Court (*Bryan,* 339 U. S. at 343; *Fleischman,* 339 U. S. at 365).

Upon remand of the cases to the Court of Appeals, that court in a *per curiam* opinion held as follows (R. 396):

> In reversing our judgments and remanding these cases to us for further proceedings, the Supreme Court did not pass upon contentions of the appellants that had not been passed upon by this court. *United States* v. *Bryan,* 339 U. S. 323, 343; *United States* v. *Fleischman,* 339 U. S. 349, 365. But substantially the same contentions have been overruled by the Supreme Court or by this court in other cases. *Dennis* v. *United States,* 339 U. S. 162; *Barsky* v. *United States,* 83 U. S. App. D.C. 127, 167 F. 2d 241, certiorari denied, 334 U. S. 843, rehearing denied, U. S. , 18 U.S.L.W. 3328; *Kamp* v. *United States,* 84 U. S. App. D.C. 187, 176 F. 2d 618, certiorari denied, U. S. , 18 U.S.L.W. 3315. The judgments of the District Court are therefore affirmed.

ARGUMENT

1. Petitioners renew their contention that government employees were, *ipso facto,* ineligible to serve on the juries which tried their cases for the reason that prejudice on the part of such jurors should be presumed as a matter of law (Pet. 13-14). They recognize, however, that *Dennis* v. *United States,* 339 U. S. 162, decided this issue against them. They in effect ask the Court to overrule that decision. We submit, however, that the entire problem was thoroughly considered in the *Dennis* case, and that there is no need for this Court to reconsider the matter. The present cases are, of course, plainly distinguishable from *Morford* v. *United States,* 339 U. S. 258. Petitioners, unlike Morford, were in no way hindered from attempting to show, on *voir dire* examination, that prospective government-employee jurors were in fact biased. See R. 27-29, 108-149.

2. Petitioners' contention that the subpoenas served on them (see R. 36-37, 170) were ineffective because they were addressed not to them but to the Sergeant-at-Arms of the House of Representatives or his special messenger (Pet. 14) is without merit. The same argument was rejected in *Kamp* v. *United States,* 176 F. 2d 618 (C.A.D.C.), certiorari denied, 339 U. S. 957. We respectfully refer the Court to pp. 7-8 of our brief in opposition to certiorari in the *Kamp* case (No. 448, O. T. 1949) for our reply to this contention.

3. Finally, it is contended on behalf of petitioner Fleischman (Pet. 14-15) that the trial court erred in submitting to the jury the issue of her guilt on the theory that she aided and abetted others in refusing to produce the subpoenaed documents, thereby wilfully making default. This contention is also without merit.

The relevant portions of the charge were as follows (R. 357-359):

* * *

> If you find that the members of the executive board, directly or indirectly, had custody or dominion and control over the records subpoenaed and could have produced the records called for, but wilfully failed and refused to do so, and that the defendant Fleischman *acted in concert with other members of the executive board,* either throughout or at any point, to prevent the committee from getting the subpoenaed records, then you may find the defendant Fleischman guilty, if you find that the other elements hereinafter set out have been proved by the United States beyond a reasonable doubt.
>
> * * *
>
> It is incumbent upon the Government to prove each and all of the essential elements of the crime charged. Briefly, the elements of this offense, as applicable to the defendant, are as follows:
>
> * * *

3. That the defendant, alone *or in concert with one or more of the defendants,* had custody or dominion and control over such records.

4. That the defendant, acting alone *or in concert with one or more of the defendants* and with knowledge that she had been served with such subpoena, wilfully made default, that is, wilfully failed to produce the records called for by the subpoena.

The Court instructs you that it is the law that when two or more persons *act in concert or participate in* an illegal activity, each is responsible, irrespective of the part he plays in the activity; or if one person *aids or abets, advises, or counsels, or encourages* another to commit an offense, he is equally liable under the criminal law with the one who physically commits it. If you find that the defendant did not *participate in* these activities, or did not *aid, abet, counsel or advise* another to commit an offense, you shall find her not guilty. [Italics supplied.]

* * *

From the context in which the "aid and abet" language appears in the above instructions, it is clear, we think, that the trial judge, in using the "aid and abet" terminology, was not submitting to the jury a different theory of guilt from the "acting in concert" theory. He was merely expressing, in other language, the same general idea, *i.e.,* that the jury could convict Fleischman if they found

from the evidence that she "acted in concert with" the other members of the executive board in refusing to produce the subpoenaed documents, or that she "aided and abetted" the other members in their refusal. In the light of the evidence adduced at the trial (summarized by this Court in its *Fleischman* opinion, 339 U. S. at 352-356), there manifestly was no danger that the jury might have supposed that the judge was presenting them with alternative theories of guilt. Since this Court has already, after careful review of the evidence against Fleischman, sustained her conviction on the "acting in concert" theory of guilt (see 339 U. S. at 356-358), the present contention raises no issue warranting further review.[3]

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[3] Petitioners mention *en passant* the contention that the charter of the Un-American Activities Committee of the House of Representatives is unconstitutional (Pet. 12). They recognize that argument on this issue has "been made to this Court at great length in numerous briefs submitted by parties and *amici curiae*" (*ibid.*). The constitutionality of the Committee's charter has been upheld in *United States* v. *Josephson*, 165 F. 2d 82, 87-92 (C. A. 2), certiorari denied, 333 U. S. 838; *Barsky* v. *United States*, 167 F. 2d 241, 244-251 (C.A.D.C.), certiorari denied, 334 U. S. 843, rehearing denied, 339 U. S. 971; *Eisler* v. *United States*, 170 F. 2d 273, 279 (C.A.D.C.), certiorari dismissed, 338 U. S. 883; *Dennis* v. *United States*, 171 F. 2d 986, 987-988 (C.A.D.C.), certiorari granted, limited to a different question, 337 U. S. 954, and affirmed, 339 U. S. 162; *Lawson* v. *United States*, 176 F. 2d 49, 52-53 (C.A.D.C.), certiorari denied, 339 U. S. 934; *Marshall* v. *United States*, 176 F. 2d 473, 474 (C.A.D.C.), certiorari denied, 339 U. S. 933. Our brief in this Court in the *Eisler* case, *supra* (No. 255, O. T. 1948), pp. 22-64, presents in full our arguments on this issue. See also our brief in opposition to certiorari in the *Josephson* case, *supra*, No. 535, O. T. 1947, pp. 11-18.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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